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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand

Ms. Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Presentation in GN Docket No. 00-185

Dear Ms. Salas:

In accordance with the Commission's regulations, this filing describes a permitted *ex parte* meeting regarding the above-referenced docket. On December 3, 2001, Dave Baker, Vice President for Law and Public Policy for EarthLink, Inc. ("EarthLink"), and the undersigned met with Commissioner Kevin Martin and with Monica Shah Desai and Catherine Crutcher Bohigian of his staff. The discussion focused on the existing legal authority that requires cable companies that offer Internet access to the public using their own network transmission facilities to sell transport over those facilities to other ISPs on nondiscriminatory terms and conditions. More specifically, the discussion focused on the reasons why cable companies that use their own transmission facilities to provide Internet access service to the public are common carriers under judicial and Commission precedent and the Communications Act. The EarthLink representatives provided to the Commissioner a copy of the written *ex parte* filed by EarthLink on November 8, 2001 in this docket (letter to Mr. W. Kenneth Ferree), a one-page common carrier analysis, and a copy of the *amicus* brief filed by EarthLink in the *Gulf Power* case pending before the United States Supreme Court. Copies of the latter two documents are attached. The first, as noted above, is already on file in this docket.

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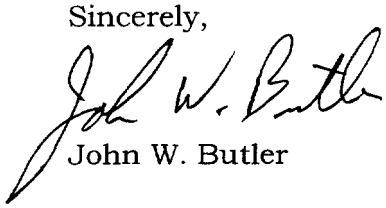
Please direct any inquiries regarding this filing to the undersigned. Thank you for your kind assistance.

Sincerely,



John W. Butler

Counsel to EarthLink, Inc.

cc: Qualex International
Catherine Crutcher Bohigian
Monica Shah Desai

Questionare to Determine if an Entity is a Communications Common Carrier

1. **Does the entity offer indiscriminate service to whatever public its service may legally and practically be of use to?**

   No ____ Entity is not a common carrier.

   Yes ____ Go to Question 2.

   NARUC I, 525 F.2d 630 at 642 (indiscriminate offering of service).

2. **Does the service allow users to transmit intelligence of their own design and choosing?**

   No ____ Entity is not a communications common carrier.

   Yes ____ Go to Question 3.

   NARUC I, 525 F.2d 630 at 641, n. 58 (transmission of user's information). See also *NARUC II*, 533 F.2d 601 at 609 (same).

3. **Does the entity own or control the transmission facilities used to provide the service to the public?**

   No ____ Go to Question 4.

   Yes ____ Entity is a communications common carrier subject to regulation under title II of the Communications Act, even if the service provided to the public for a fee is an information service.

   Frame Relay, 10 FCC Rcd 13717 at 13722, ¶¶ 41 – 46 (contamination theory does not apply to facilities based carrier; bundling of basic and enhanced service in single offering to the public does not change common carrier status).
   See also *Computer II*, 77 FCC 2d 384 at 474, ¶ 231 (all facilities based carriers must offer separately the transmission service used to provide enhanced service).

4. **Is the service offered indiscriminately to the public over facilities not owned or controlled by the entity an enhanced or information service?**

   No ____ Entity is a communications common carrier subject to regulation under title II of the Communications Act (i.e., a reseller).

   Yes ____ Entity is an information service provider (a "pure" ISP) that is subject to FCC jurisdiction under title I of the Communications Act but is exempted from regulation as a communications common carrier under title II of the Communications Act.

   Frame Relay, 10 FCC Rcd 13717 at 13719, ¶¶ 17 and 18 (contamination theory). See also, *Id.* at 13718, n. 6 (definition of VAN – Value Added Network provider) and *Computer II*, 77 FCC 2d 384 at 432, ¶¶ 124 and 125 (title I jurisdiction).

IN THE
Supreme Court of the United States

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Petitioners,

v.

GULF POWER COMPANY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF EARTHLINK, INC. AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

INTEREST OF *AMICUS* EARTHLINK, INC.[1]

EarthLink, Inc. ("EarthLink"), having obtained the written consent of the parties pursuant to Rule 37.3 of the Rules of this Court,[2] submits this brief as *amicus curiae*. EarthLink is the second largest Internet service provider ("ISP") in the nation. EarthLink is the largest ISP that is not controlled by or under common ownership with a cable television company. The first question on which certiorari was granted—the scope of the authority of the Federal Communications Commission ("FCC" or "Commission") under section 224 of the

[1] In accordance with the Court's Rule 37.6, EarthLink and its counsel certify that no counsel for a party authored this brief in whole or in part and that no person or entity other than EarthLink made any monetary contribution to the preparation or submission of this brief.

[2] The consents have been filed with the Clerk with this brief.

Communications Act of 1934[3] to regulate the rates for pole attachments made by cable companies that offer Internet access service—is of critical interest to EarthLink for two reasons.

First, to the extent that EarthLink is able to purchase from cable companies transmission services that EarthLink may use to deliver its Internet access services to consumers, the price that EarthLink will pay for such transmission will depend in part on how much a cable company may have to pay to a utility to attach its cables to the utility's poles. Second, and ultimately of much greater consequence, the proper application of section 224 to pole attachments used by cable companies to deliver Internet access services to consumers will require that the Court decide whether such attachments are used in the provision of "cable service" or "telecommunications service."

Because the statutory definitions that control that decision apply to the entire Communications Act, not just section 224, how the statutory classification question is answered will determine not only the applicable rate for pole attachments, but also whether ISPs such as EarthLink, which do not have their own transmission facilities, will be able to purchase use of transmission facilities from cable operators. The reason that access to transmission services is implicated by the

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[3] The Communications Act of 1934 is codified generally at 47 U.S.C. §§ 151 *et seq*. There are numerous references in the record to the "Pole Attachments Act." Section 224 (Regulation of Pole Attachments) was added to the Communications Act of 1934 by section 6 of the Communications Act Amendments of 1978, P.L. 95-234, 92 Stat. 35, which also amended other parts of the Communications Act. Accordingly, there is no "Pole Attachments Act," and when EarthLink speaks of the "Act" or the "Communications Act," it means the Communications Act of 1934, as amended. The point is not purely semantic, because the statutory terms discussed in the analysis below apply to the entire Act, not just section 224. *See* 47 U.S.C. § 153 ("For the purposes of this Act, unless the context otherwise requires – . . . .").

court's resolution of the statutory classification issue is that providers of telecommunications services are required under sections 201 and 202 of the Communications Act to sell their telecommunications services on nondiscriminatory terms to all qualified buyers.[4] 47 U.S.C. §§ 201, 202. Providers of cable services are not subject to the same obligation. 47 U.S.C. § 541(c).

SUMMARY OF ARGUMENT

Petitioners FCC and the National Cable Television Association, Inc. ("NCTA") have presented the issue of the Commission's authority to regulate pole attachments for

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[4] As the power utility parties note in their Brief in Opposition to the petitions for certiorari, the FCC has requested and received comments on the question of whether transmission services used by cable companies to provide Internet access constitute "telecommunications services." *See* Appendix to Brief In Opposition (FCC *Notice of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* GN Docket No. 00-185 (2000)). The Commission has issued no order in that docket. The issue of ISP access to cable transmission services has also been raised in earlier Commission proceedings, but the Commission has refused to address it. *See, e.g., In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 15 F.C.C.R. 9816, 9872 (2000) ("[T]he Commission has not determined whether Internet access via cable system facilities should be classified as a "cable service" subject to Title VI of the Act, or as a "telecommunications" or "information service" subject to Title II. There may well come a time when it will be necessary and useful from a policy perspective for the Commission to make these legal determinations."). *See also In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, Memorandum and Order, 14 F.C.C.R. 3160, 3201, 3207 (1999). The fact that the Commission has had squarely presented to it the issue of the proper classification of cable-based transmission services used to deliver Internet access but has consciously declined to address it makes somewhat hollow the Commission's request that the Court remand that issue to the Commission if the Court disagrees with the outcome below. *See* Commission Reply To Brief In Opposition at 5.

cable facilities used to transmit Internet access services as one that turns on a plain reading of sections 224(a)(4) and 224(b)(1). *See, e.g.,* Commission Petition at 12. The electric utility respondents, on the other hand, contend that resolution of the first issue upon which certiorari was granted requires that the Court decide whether pole attachments used for cable facilities over which Internet access services are transmitted are used to provide "cable service" or "telecommunications service." Brief in Opposition at 7. EarthLink agrees with respondents that determining whether the Commission has properly applied its pole attachment authority under section 224 requires that the Court determine the statutory classification of the services for which the pole attachments are used.

A straightforward application of the plain language of the Act and uncontested and longstanding Commission precedent demonstrates that the pole attachments at issue are used to provide telecommunications service when they are used to deliver Internet access service to the public.[5] This is so because Internet access service is itself an "information service," which the Act states by definition is provided "via telecommunications."[6] 47 U.S.C. § 153(20). When "tele-

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[5] In its February 5, 2001, Motion for Leave to Dispense With Preparation of a Joint Appendix, the Commission stated that: "The questions presented are questions of law." *Id.* at 1. EarthLink agrees. EarthLink also believes that those questions may be resolved by a plain reading of the Act, and accordingly that there are no statutory ambiguities with respect to which the Court owes any deference to the Commission's interpretation. *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984).

[6] The appeals court properly noted that Internet access service is itself an "information service." *Gulf Power Co. v. F.C.C.*, 208 F.3d 1263, 1277 (11th Cir. 2000); Appendix To Commission's Petition for Writ of Certiorari at 30a (hereinafter "Commission Appendix"). As discussed further below, however, the court's failure to recognize that every

communications" is offered to the public for a fee, it is a "telecommunications service." 47 U.S.C. § 153(46). The information service known as Internet access and the telecommunications over which that service by definition rides are both being offered to the public for a fee by the cable companies using pole attachments for which those companies seek regulated rates. Thus, the pole attachments at issue are used to provide a telecommunications service, and such attachments are properly assigned the section 224(e) rate.

A plain reading of the Act also makes clear that Internet access service is not a "cable service," and that the entities making pole attachments to provide Internet access service are not operating "cable television systems" to the extent that they use their cable facilities to provide Internet access service. Properly determining that the pole attachments at issue are used to provide telecommunications services compels the result that rates for such attachments must conform to the criteria set forth in section 224(e) in the absence of a voluntary agreement between the utility and the attaching entity.[7]

To summarize, application of the authorities discussed below leads to the following conclusions. (1) As the

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information service offered to the public for a fee necessarily includes a telecommunications service renders its analysis fatally incomplete.

[7] As EarthLink discusses in section C, *infra*, the Commission has made it clear that a single rate applies to each pole attachment, regardless of the number of different types of service provided using that attachment (*e.g.*, cable service and telecommunications service). This is consistent, for example, with the language of section 224(d)(3), which provides that the rate specified in that section applies to pole attachments used to provide both cable services and telecommunications services until the new rate described in section 224(e) is established. 47 U.S.C. § 224(d)(3). After February 8, 2001, when telecommunications services are offered over the same attachments as cable services, the section 224(e) rate applies. *See* Commission Appendix at 65a, n. 26.

Commission has stated, Internet access is an "information service" under the Act. (2) By the plain terms of the Act, "information services" are provided "via telecommunications." 47 U.S.C. § 153(20). (3) Telecommunications offered to the public for a fee constitutes "telecommunications service," "regardless of the facilities used." 47 U.S.C. § 153(46). (4) Pole attachments used to transmit Internet access service to the public are being used to provide a "telecommunications service" to which the section 224(e) pole attachment rate applies.

The purpose of this brief is to bring to the attention of the Court the legal authorities that provide this clear and simple resolution. In applying these authorities to the decision below, EarthLink urges the Court to overturn that part of the lower court's decision that states that the Commission has no authority to regulate pole attachments used by cable companies to deliver Internet access services, but to affirm those parts of the decision that hold that Internet access is not a cable service and that the Commission must follow the mandates of sections 224(d) and 224(e) in applying its pole attachment rate authority.

ARGUMENT

A. The Court Of Appeals Properly Rejected The Commission's Claim That It Could Disregard Subsections (d) and (e) Of Section 224.

At the outset, EarthLink agrees with the Eleventh Circuit and the utility companies that the proper application of section 224 requires that the statutory classification of the services for which pole attachments are used must always be determined before the Commission may set a rate for those attachments. *Gulf Power v. F.C.C.*, 208 F.3d at 1276; Commission Appendix at 27a; Brief in Opposition at 13. This is so because the Act provides *no* discretion to the Commission as to whether to apply the section 224(e) rate if

the pole attachment at issue is used to provide "telecommunications services." As the Commission itself held in the order under review, the provisions of section 224(e) are mandatory if they are applicable:

> We note that *in the one case where Congress affirmatively wanted a higher rate for a particular service offered by a cable system, it provided for one in section 224(e).* In requiring that the Section 224(d) rate apply to any pole attachment used 'solely to provide cable service,' we do not believe Congress intended to bar the Commission from determining that the Section 224(d) rate methodology also would be just and reasonable *in situations where the Commission is not statutorily required to apply the Section 224(e) rate.*

In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Report and Order, 13 F.C.C.R. 6777, 6796; Commission Appendix at 90a (emphasis added) (the Commission's order below is hereinafter referred to as the "Order").

Because the Commission acknowledges that it must apply the section 224(e) attachment rate if a pole attachment is used to provide a "telecommunications service," and because the Commission further recognizes that the section 224(e) rate is different from the section 224(d) rate that the Commission chose to apply, it is necessary in applying section 224 first to determine whether the admittedly mandatory rates prescribed by section 224(e) apply. If those rates do apply, that is the end of the matter, and there is no need to determine whether the Commission has any discretion to set rates for services that could hypothetically fall outside of the "cable service" and "telecommunications service" classifications. Accordingly, the Commission's Order is fundamentally flawed because the Commission quite consciously decided not to answer the threshold question of whether the relevant pole attachments are used to provide a "telecommunications

service" (and are thus covered by section 224(e)), or whether they are used "solely to provide cable service" and are therefore grandfathered at a lower rate under section 224(d)(3). In its Order, the Commission stated:

> We need not decide at this time, however, the precise category into which Internet services fit. Such a decision is not necessary in order to determine the pole attachment rate applicable to cable television systems using pole attachments to provide traditional cable services and Internet services.

Commission Appendix at 89a-90a.

If it turned out that cable-based Internet access services were in fact "solely" cable services, then the analytical infirmity of the Commission's abbreviated approach would have no practical effect because the rate that the Commission set would comport with the rate set by the statute, albeit for a reason different from that stated by the Commission. In a more complex situation, if the Commission had determined that the pole attachments were used to provide neither a "cable service" nor a "telecommunications service," then this Court would be faced with two questions. The first would be whether the Commission was correct in its classification of the service for which pole attachments were sought. If that question were answered in the affirmative, the second question that would have to be addressed would be the one that the Commission seeks to have answered, namely, whether the Commission has independent authority under sections 224(a)(4) and 224(b)(1) to set pole attachment rates for cable facilities used to transmit Internet access services. Neither of those scenarios is presented here.

As EarthLink demonstrates below, the pole attachments at issue here are used to provide a "telecommunications service" when they are used for communications links over which Internet access services are transmitted to the public.

Accordingly, the Commission's failure to address the question of whether the pole attachments are used in the provision of telecommunications services renders its Order invalid. However, because the pole attachments at issue are as a matter of law used to provide "telecommunications service," the Eleventh Circuit's holding that the Commission has no jurisdiction over cable company attachments used to provide Internet access service is incorrect and should be reversed.[8]

B. Internet Access Service Is Not A "Cable Service," And The Entities That Seek Attachments Do Not Operate "Cable Television Systems" When They Provide Internet Access Service.

As noted above, if the service at issue were in fact "solely" a cable service, then the Commission's Order, although analytically infirm, would be legally supportable on grounds other than those offered by the Commission. This possibility need not long delay the Court. The Eleventh Circuit's reasoning as to why Internet access is not a "cable service" is undeniably correct. That reasoning echoes the reasoning of the Ninth Circuit Court of Appeals in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 1999). Both the Eleventh Circuit and the Ninth Circuit properly concluded that the Communications Act's definition of "cable service," which states that cable service is the "one-way transmission to subscribers of (i) video programming, or (ii) other programming service. . . ," does not apply to Internet access service. 47 U.S.C. § 522(6). As both courts recognized, Internet traffic is in no sense "one-way," nor does it have the

[8] Because the Act is clear that the definition of "telecommunications service" does not depend on the nature of the facilities used to provide that service, 47 U.S.C. § 153(46), EarthLink agrees with the FCC that the Eleventh Circuit's decision on the second issue on which certiorari was granted should be reversed.

other attributes of the services that Congress designated as "cable services." *See Portland*, 216 F.3d at 876-77; *Gulf Power*, 208 F.3d at 1276-77; Commission Appendix at 27a-29a. *But see MediaOne Group, Inc. v. County of Henrico, Virginia*, 97 F. Supp.2d 712, 715 (E.D. Va. 2000) (*appeal pending* 4th Cir.). Accordingly, the decision below should be affirmed as written with respect to the conclusion that Internet access service is not a "cable service."

Related to the point that Internet access services are not cable services is the fact that the transmission facilities for which cable companies here seek attachments are not "cable television systems" under the plain language of the Act when they are used to provide Internet access services to the public. The Commission places heavy emphasis on the fact that section 224(a)(4) defines "pole attachment" as "*any* attachment by a cable television system or provider of telecommunications service. . . ." Commission Petition at 12 (emphasis in original). The Commission's emphasis on the word "any" is not by itself inappropriate, but that emphasis overlooks the need to scrutinize carefully the definition of the term "cable television system." That term is not defined in the Act, but it is defined in the Commission's regulations. 47 C.F.R. § 76.5(a) sets forth the same definition for both "cable system" and "cable television system." That regulation reads in relevant part as follows:

> (a) *Cable system or cable television system.* A facility consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, *but such term does not include*: . . .
>
> (3) *A facility of a common carrier which is subject, in whole or in part, to the provisions of Title II of the Communications Act of 1934*, as amended, except that

> such facility shall be considered a cable system to the extent such facility is used in the transmission of video programming directly to subscribers, unless the extent of such use is solely to provide interactive on-demand services.

47 C.F.R. § 76.5(a) (emphasis added).[9]

For three reasons, all major cable companies are in fact common carriers "subject, in whole or in part," to Title II of the Communications Act, and their systems are thus not "cable television systems" except to the extent that they are used to transmit video programming.[10] First, in *City of Dallas, Texas v. F.C.C.*, 165 F.3d 341 (5th Cir. 1999), *on remand* 14 F.C.C.R. 19700, the NCTA mounted a successful challenge to a Commission order regarding open video systems on the grounds that the Commission arbitrarily differentiated between traditional local exchange carriers ("LECs") and cable-based LECs. NCTA's position was necessarily premised on the fact that cable companies are LECs. *Id.* at 353-354. All LECs are undoubtedly covered by Title II of the Act. *See, e.g.*, 47 U.S.C. § 251(b). Second, as EarthLink discusses in greater detail below, cable companies are

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[9] The Commission must, of course, follow its own regulations. *Morton v. Ruiz*, 415 U.S. 199, 235 (1974). With the exception of a deleted parenthetical that is not here relevant, the Commission's regulatory definition of "cable system" and "cable television system" is verbatim the definition provided by the Act for "cable system." 47 U.S.C. §§ 153(8), 522(7). That the two terms are synonymous is also demonstrated by the second sentence of section 224(d)(3), which uses the term "cable system" instead of "cable television system."

[10] The Act defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station." 47 U.S.C. § 522(20). It is self-evident that Internet access does not fit that definition, and the Commission has so ruled. *In the Matter of Internet Ventures, Inc. and Internet On-Ramp, Inc. Petition for Declaratory Ruling*, Memorandum Opinion and Order, 15 F.C.C.R. 3247, 3253-54 (2000).

telecommunications carriers subject to Title II of the Act because they are providing to the public for a fee the transmission ("telecommunications") necessary to deliver the very Internet access services here at issue. 47 U.S.C. §§ 153(20) and 153(46). Third, petitioner NCTA flatly told the Commission that its members provide telecommunications services: "NCTA's members also utilize poles, conduits and rights of way to deliver telecommunications services." *In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996*, CS Docket No. 97-151, Comments of NCTA at 1 (Sept. 26, 1997).

Because cable companies use the same facilities[11] to provide both cable services and telecommunications services that are subject to Title II of the Act, their systems fall within the 47 C.F.R. § 76.5(a)(3) exclusion from the definition of "cable television system" to the extent that they are used to provide any service other than video programming. Accordingly, the pole attachments at issue cannot be regulated as attachments made by a "cable television system" and must be regulated as attachments made by "providers of telecommunications services," i.e. "telecommunications carriers." 47 U.S.C. § 153(44) (" 'telecommunications carrier' means any provider of telecommunications services"). This analysis by itself entirely disposes of the Commission's argument that sections 224(a)(4) and 224(b)(1) provide it with authority to regulate the rates for the pole attachments at issue here, because the Commission's Order is premised entirely on the incorrect assumption that the Commission is dealing with "cable television systems."[12]

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[11] *See* Commission Petition at 13 ("Cable television service and Internet access are routed through the same pole attachments–indeed, through the same wires at the same time.").

[12] *See* Commission Appendix at 90a. In *Texas Utilities Electric Co. v. F.C.C.*, 997 F.2d 925 (D.C. Cir. 1993), a case relied upon heavily by petitioners, the court rejected an argument that the Commission's then-

C. The Pole Attachments At Issue Are Used To Provide A Telecommunications Service Under the Plain Language of the Statute and the Commission's Longstanding Precedent.

The Commission in its Order simply chose not to address whether the pole attachments at issue are used to provide telecommunications services. The Eleventh Circuit began that analysis, but stopped too soon. The court of appeals correctly noted that Internet access is an information service, not a telecommunications service. *Gulf Power*, 208 F.3d at 1277, 1278; Commission Appendix at 30a-31a. As EarthLink demonstrates below, however, the finding that Internet access is an information service compels rather than defeats the conclusion that pole attachments used in the delivery of Internet access services to the public are used to provide telecommunications services.

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existing regulatory definition of "cable television system" excluded coverage under section 224 for pole attachments by cable companies used for services other than "cable services." The court's rejection of that argument was based primarily on the notion that it did not believe that Congress intended to limit cable companies' pole attachment rights only to those attachments used to provide traditional video programming. *Id.* at 931. That concern has been obviated by the 1996 amendments, under which section 224 now provides mandatory pole attachment rights and regulated rates for "pole attachments used by telecommunications carriers to provide telecommunications services. . . ." 47 U.S.C. §§ 224(e) and 224(f). Inasmuch as it is the use of a cable facility to provide telecommunications services (which are regulated under Title II of the Act) that triggers the exclusion found at 47 C.F.R. § 76.5, the section 224 coverage of pole attachments used to provide telecommunications services ensures that the exclusion creates no gap in the section 224 authority. Moreover, whereas the definition of "cable system," which the Commission has defined as meaning the same thing as "cable television system," applied prior to the passage of the Telecommunications Act of 1996 only to Title VI of the Act (*see* Commission Appendix at 83a), the definition of "cable system" now expressly applies to the entire Act. 47 U.S.C. § 153(8).

The error in the lower court's analysis is that it failed to distinguish between the information processing functions that make Internet access service an "information service" under the Act and the transmission functions through which the information service is delivered to consumers. It is the transmission function ("telecommunications service") for which pole attachments are required, and it is that function, not the information processing function, that defines the uses to which pole attachments are put. The Ninth Circuit in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), succinctly described the distinction between the information service and telecommunications service functions that are combined to provide Internet access:

> Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

Id. at 878.

Before addressing in depth why the offering of Internet access service to the public necessarily includes the offering of a telecommunications service, EarthLink notes that the "commingling"[13] of telecommunications services with other services has no impact on the proper pole attachment rate. Specifically, once it is determined that a pole attachment is used to provide a telecommunications service (*see* sections C.1 and C.2, *infra*), the section 224(e) rate applies to that

[13] *See* Commission Reply to Brief in Opposition at 3.

attachment regardless of what other services may be offered using the same attachment. The Commission stated: "Separately, Section 224(e)(1), the subject of this Order, governs rates for pole attachments used in the provision of telecommunications service, including single attachments used jointly to provide both cable and telecommunications service." Commission Appendix at 64a-65a. That section 224(e)(1) applies to cable operators is reinforced by the Commission's regulations, which state: "Cable operators must notify pole owners upon offering telecommunications services." 47 C.F.R. § 1.1403(e).

In this regard, section 224(e), unlike section 224(d)(3), does not contain the word "solely." The section 224(e) rate applies to *any* attachment that a provider of telecommunications uses to provide a telecommunications service. 47 U.S.C. § 224(a)(4). Accordingly, it is irrelevant for the purposes of applying section 224(e) that a telecommunications service is in turn used to deliver a separate service, such as Internet access. The Commission, and apparently all of the parties, agreed on this point in the Commission's proceeding below:

> We also agree with cable operators, telecommunications carriers, and utility pole owners that, if an attachment previously used for providing solely cable services would, as a result of the leasing of dark fiber, also be used for providing telecommunications services, the rate for the attachment would be determined under Section 224(e), consistent with our discussion regarding restrictions on service provided over pole attachments.

Commission Appendix at 118a-119a (footnotes omitted). The Commission's conclusion that an attachment previously used "solely to provide cable service" is governed by section 224(e) once that attachment is also used to provide a

telecommunications service has not been challenged by any party.[14]

Having established that the section 224(e) rate applies in every case in which a pole attachment is used in the provision of a telecommunications service (whether alone or in combination with another service), EarthLink next demonstrates why, under the plain language of the Act and twenty years of Commission precedent, there is necessarily a telecommunications service being offered in each instance in which an Internet access service is offered to the public for a fee. We begin with the statutory language, followed by a discussion of the Commission's orders applying that language.

1. The Communications Act Analysis

The first step in the analysis set forth below renders the result that Internet access is itself an "information service." The second step, which requires nothing more than a plain reading of the definition of "information service," demonstrates that information services are provided "via telecommunications." 47 U.S.C. § 153(20). The third step asks whether the telecommunications over which the information service is provided is offered "for a fee directly to the public or to such classes of users as to be effectively available directly to the public" so as to fall within the

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[14] In an earlier, related pole attachment proceeding, the Commission said:

> The 1996 Act also created a distinction between pole attachments used by cable operators solely to provide cable service and pole attachments used by cable operators or by any telecommunication[s] carrier to provide any telecommunications service. The Act prescribed a new methodology for determining pole attachment rates for the latter group.

In the Matter of Implementation of Section 703 of the Telecommunications Act of 1996, 11 F.C.C.R. 9541, 9544 (1996).

definition of "telecommunications services," 47 U.S.C. § 153(46), and thus within the scope of section 224(e).

a. Internet Access Service Is Itself An "Information Service."

The Act states that:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20). The "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information" describes precisely the characteristics of Internet access service and the purposes for which consumers use that service.[15] The Commission has recognized this and has held that "Internet access" is an information service:

> In order to provide those components of Internet access services that involve information transport, ISPs lease lines, and otherwise acquire telecommunications, from telecommunications providers–LECs, CLECs, IXCs, and others. . . . *Thus, the information service is provisioned by the ISP "via telecommunications" including interexchange communications although the Internet service itself is an "information service" under section*

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[15] *See In The Matter Of Federal-State Joint Board on Universal Service*, Report To Congress, 13 F.C.C.R. 11501, 11540 n.165 (1998) (hereinafter "*Universal Service Report to Congress*") ("the very core of the Internet and its associated services is the ability to 'retrieve' and 'utilize' information").

3(20) of the Act, rather than a telecommunications service.

In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, 15 F.C.C.R. 385, 401 (Dec. 23, 1999) (emphasis added).[16]

b. Information Services Such As Internet Access Are Delivered Via Telecommunications.

The Act states that "information service means the offering of a capability for generating, acquiring . . ., or making available information *via telecommunications*. . . ." 47 U.S.C. § 153(20) (emphasis added). Accordingly, because Internet access service is an information service, it is clear from the statute that Internet access service is provided "via telecommunications." *Id.*

c. The Telecommunications Used To Deliver The Information Service Known As Internet Access Is Offered To The Public For A Fee And Is Thus A Telecommunications Service.

That Internet access is an information service provided "via telecommunications" does not by itself answer the question of whether the telecommunications used to provide Internet

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[16] The Commission had earlier reported to Congress that Internet access is an "information service":

> The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. *As such, we conclude that it is appropriately classed as an "information service."*

Universal Service Report to Congress, 13 F.C.C.R. at 11540 (footnote omitted) (emphasis added).

access is a "telecommunications service," a term that the Act defines separately from "telecommunications." The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). In order to determine whether the offering of Internet access service (an information service) includes the offering of a "telecommunications service," it is necessary under the third step of the analysis outlined above to determine whether the "telecommunications" that the Act states is used to provide the "information service" known as Internet access is being offered "for a fee directly to the public." *Id.*

Petitioner NCTA has answered that question in the affirmative for the cable companies. NCTA's petition for certiorari conclusively establishes that the cable industry is holding itself out to a large segment of the public as a provider of Internet access:

> Recent technological advances have allowed cable operators, who have invested billions of dollars in the effort, to upgrade further their existing coaxial cables and other equipment so that they can simultaneously carry both traditional video programming services and high-speed or "broadband" Internet access at data transmission speeds hundreds of times faster than the "narrowband" services available through traditional telephone lines. *The cable industry thus actively competes against numerous segments of the communications industry to provide high-speed Internet services to consumers nationwide.*

NCTA Petition for a Writ of Certiorari at 4 (emphasis added). The NCTA in its petition also cites to a Commission report that found as of October 30, 2000, the cable industry provided approximately 2.2 million high speed lines connecting consumers to the Internet. NCTA Petition at 5. Under any

recognizable definition of the "public," the cable industry is providing Internet access—and thus necessarily the "telecommunications" over which Internet access rides—to the public.[17]

The remaining question that must be answered in order to determine if the telecommunications offered by cable companies that provide Internet access to the public is a "telecommunications service" is whether such companies offer that telecommunications "for a fee." 47 U.S.C. § 153(46). Common sense and simple economics dictate that cable companies are not giving away Internet access or the telecommunications over which Internet access is delivered, and EarthLink does not expect any cable company to argue that it is doing so. Public advertising and information distributed by cable companies that offer Internet access service confirm that customers must pay for the service. For example, the web sites of major cable operators such as Cox, Comcast, and AT&T all describe standard rate options for various cable-based Internet access services. These companies' rates can be viewed electronically at, respectively, www.cox.com, www.comcast.com, and

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[17] The classic test for determining whether a telecommunications provider is a "common carrier" for purposes of the Communications Act is set forth in *National Association of Regulatory Utility Commissioners v. F.C.C.*, 525 F.2d 630 (D.C. Cir. 1976), *cert. den'd* 425 U.S. 992 ("*NARUC I*"). Under the *NARUC I* test, which provides that service providers are common carriers if they hold themselves out indiscriminately to serve the public, it is not necessary that "a given carrier's services must practically be available to the entire public." Instead, "one must hold oneself out indiscriminately to the clientele one is suited to serve. . . ." *Id.* at 641. Under the figures cited by the NCTA, this test is clearly met. The D.C. Circuit recently upheld a Commission ruling that the *NARUC I* test is applicable to determine when a carrier is a "telecommunications carrier" (*i.e.*, a "provider of telecommunications services," 47 U.S.C. § 153(44)) under the Communications Act, as amended by the Telecommunications Act of 1996. *Virgin Islands Telephone Corp. v. F.C.C.*, 198 F.3d 921, 926 (D.C. Cir. 1999).

www.athome.att.com. Cable companies that provide Internet access and its necessary telecommunications component thus meet the final test for providing "telecommunications service," namely, that the service is offered "for a fee." 47 U.S.C. § 153(46). Accordingly, the section 224(e) rate must apply.

In other fora, members of NCTA have suggested that the fact that end users are charged a single fee for Internet access means that no fee is charged for the telecommunications component of that service, and that the cable company is therefore not providing telecommunications to the public for a fee. The Commission has consistently rejected the argument that charging a single fee for the combined offering of an information service and the telecommunications service over which it rides means that no fee is charged for the telecommunications component: "As we have stated *basic services form one component of the charges for enhanced services*–the remaining components of which are available from the competitive resources and capabilities of the data processing industry."[18] *In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations* (Second Computer Inquiry), Final Decision, 77 F.C.C.2d 384, 435 (1980) (emphasis added) (hereinafter "*Computer II*"). *See also In the Matter of Federal-State Joint Board on Universal Service*, Fourth Report and Order On Reconsideration, 13 F.C.C.R. 5318, 5474 (1997) ("We disagree with ITAA's contention that, because systems integrators provide both basic telecommunications services as well as enhanced services for a single price, systems integrators are engaged exclusively in the provision of enhanced information services."); *see also In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, CC Docket Nos. 96-61, 98-183, ¶40

[18] "Basic services" are "telecommunications services." *See* n. 19 *infra.*

(March 30, 2001) (reaffirming that carriers that provide packages of telecommunications and enhanced services at a single price must make transmission capacity available separately).

Thus, under the plain language of the statute and the facts as presented by petitioner NCTA, the pole attachments here at issue are used to provide "telecommunications service." Pole attachments for those services are therefore regulated under section 224(e) of the Act.

2. Twenty Years Of Commission Precedent Holds That Information Services Offered To The Public Are Always Delivered Using A Telecommunications Service.

The conclusion from the plain language of the Act that the offering of Internet access services to the public for a fee necessarily includes the offering of a telecommunications service is supported by twenty years of Commission precedent.

Since its decision in *Computer II*, the Commission has consistently held that every information service that is offered to the public is delivered by a common carrier transmission service (*i.e.*, a "telecommunications service"). *See* 47 U.S.C. § 153(44)("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is providing telecommunications services. . . .").

In *Computer II*, the Commission established a regulatory regime that created a distinction between so-called "enhanced" computer processing services and "basic" transmission services. Under the basic/enhanced distinction of *Computer II*, the Commission chose to regulate "basic service" as a common carrier offering, but decided as a general matter to exempt from common carrier regulation "enhanced services" provided using those basic services.

Computer II, 77 F.C.C.2d at 418-19, 423. After the passage of the Telecommunications Act of 1996, the Commission reaffirmed its *Computer II* holding and restated its *Computer II* order in the language of the amended Act, replacing the term "basic service" with "telecommunications service" and the term "enhanced service" with "information service."[19]

The Commission described the distinction and the relationship between enhanced services and basic services this way in *Computer II*:

> [A]n essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. *Because enhanced services are dependent upon the common carrier offering of basic service, a basic service is the building block upon which enhanced services are offered.*

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[19] The Commission reported the following to Congress:

> Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. *Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding*, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.

Universal Service Report To Congress, 13 F.C.C.R. at 11511 (emphasis added). In a proceeding begun prior to that report, the Commission sought comment on its general conclusion that "basic service" and "telecommunications service" are the same. *In the Matter of Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 13 F.C.C.R. 6040, 6066-67 (1998). The Commission has recently asked parties to refresh the record in that proceeding. *See Update and Refresh Record on Computer III Requirements*, 66 Fed. Reg. 15064 (2001).

Id. at 475 (emphasis added). Under this framework, which the Commission has determined Congress adopted in the Telecommunications Act of 1996,[20] it is possible for a telecommunications service to exist without an information service, but it is logically, technically, and legally impossible for an information service that is offered to the public for a fee to exist without an underlying telecommunications service. Quite simply, the only way that an information service can reach the public is over a telecommunications service. Moreover, the Commission has made it clear that the fact that a telecommunications service is used to provide an information service does not in any way change the statutory classification of the telecommunications service:

> Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree. *Enhanced services by definition are services "offered over common carrier transmission facilities." Since the Computer II regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier* nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.

Filing and Review of Open Network Architecture Plans, 4 F.C.C.R. 1, 141 (1988) (brackets in original) (emphasis added).

More recently, the Commission reiterated the principle that the fact that a telecommunications service is used to deliver an information service (specifically, Internet access) in no

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[20] *See* note 19, *supra*.

way changes the nature of the underlying telecommunications service:

> [C]arriers which offer basic interstate telecommunications functionality to end users (such as ISP subscribers) are "telecommunications carriers" covered by the relevant provisions of section 251 and 254 of the Act "regardless of the underlying technology those service providers employ, *and regardless of the applications that ride on top of their services.*" In other words, even though the access provided to the ISP by the local exchange carrier facilitates the delivery of an information service because of the "applications that ride on top" of the telecommunications service, that same access necessarily facilitates the origination of the underlying telephone toll service used to transport the ISP's Internet access service.

In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Order on Remand, 15 F.C.C.R. 385, 402-03 (1999) (italics in original).

The authorities cited above make it clear that the fact that an ISP uses telecommunications services obtained from a separate carrier does not change the statutory classification of the telecommunications service. That this is the case is underscored by the fact that the Commission did not even discuss in its Order the possibility that a telecommunications carrier whose customers include ISPs or ISP subscribers would somehow lose its pole attachment rights or pay anything other than the section 224(e) rate for attachments so employed.

It is similarly clear that the statutory classification of a telecommunications service used to provide an information service does not change when a telecommunications carrier uses its own transmission facilities to provide that

information service. The Commission addressed precisely this issue in 1995:

> Thus, having applied Commission Rules and found that Frame Relay Service is a basic service, we conclude that, pursuant to the Computer II decision, *all facilities-based common carriers providing enhanced services in conjunction with basic frame relay service must file tariffs for the underlying frame relay service* and acquire that tariffed service in the same manner as resale carriers.

In the Matter of Independent Data Communications Manufacturers' Association, Inc., Petition for Declaratory Ruling That AT&T's Frame Relay Service Is A Basic Service, Memorandum Opinion and Order, 10 F.C.C.R. 13171, 13725 (1995) (emphasis added) (hereinafter "*Frame Relay Order*"); *see also Portland*, 216 F.3d at 878.

Earlier in the *Frame Relay Order*, the Commission specifically declined to apply the so-called "contamination theory" to facilities-based carriers that provide both basic (telecommunications) services and enhanced (information) services. The "contamination theory" is the mechanism by which the Commission has chosen to exempt from common carrier regulation those information service providers (such as EarthLink) that do not own their own transmission facilities and therefore purchase telecommunications service from others in order to deliver their information services.[21] In

[21] The name for the contamination theory comes from the concept that, with respect to information service providers that do not use their own transmission facilities, the combining of the information service provider's information services with the telecommunications service purchased from a common carrier "contaminates" the telecommunications service and, *for the purposes of the Commission's exercise of common carrier authority over the non-facilities-based information service provider only*, renders the entire offering an unregulated information service. *See, e.g., Frame Relay Order*, 10 F.C.C.R. at 13719. The

declining to apply the contamination theory to facilities-based carriers, the Commission summarized the purpose of keeping the telecommunications service and information service functions separate for regulatory purposes, especially when both services are offered by the same entity:

> Moreover, application of the contamination theory to a facilities-based carrier such as AT&T would allow circumvention of the Computer II and Computer III basic-enhanced framework. AT&T would also be able to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. This is obviously an undesirable and unintended result.

Frame Relay Order at 13723.

All of these authorities point to the same conclusion: a telecommunications service used to transmit an information service remains a telecommunications service. Despite the clarity of the Act and the Commission's own precedent, the Commission in the Order under review has *sub silentio* adopted a rule that treats telecommunications services offered by cable companies in combination with information services (here, Internet access services) differently than the same telecommunications services offered in combination with information services by more traditional telecommunications

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rationale for exempting from common carrier regulation those information service providers that do not own their own transmission facilities is that the Commission will in every instance continue to regulate the telecommunications service that underlies an offering to the public of information services, whether that telecommunications service is purchased by the information service provider from a third party or provided using the information service provider's own facilities. *See, e.g., Computer II*, 77 F.C.C. 2d at 429 ("This structure enables us to direct our attention to the regulation of basic services and to assuring nondiscriminatory access to common carrier telecommunications facilities by all providers of enhanced services.").

carriers.[22] Specifically, although the Commission appears to have no doubt that a telephone company that also provides Internet access to the public is necessarily offering telecommunications service (and thus may obtain pole attachments at the section 224(e) rate), the Commission has, without explanation, simply ignored the fact that a cable company providing the same combination of services is also providing a telecommunications service.

The statute does not allow this. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public . . ., *regardless of the facilities used*." 47 U.S.C. § 153(46) (emphasis added). As the Commission has affirmatively acknowledged in the specific context of transmission services associated with Internet access, cable companies can and do provide telecommunications services:

> Stated differently, *when other telecommunications carriers, such as interexchange carriers (IXCs) or cable service providers*, compete with the BOCs in providing basic services to ISPs, the BOCs are less able to engage successfully in discrimination and cost misallocation because they risk losing business from their ISP customers for basic services *to these competing telecommunications carriers*.

In The Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Further Notice Of Proposed

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[22] Twenty-five years ago, the U.S. Court of Appeals for the District of Columbia Circuit reversed a Commission decision that made the same mistake. In *National Association of Regulatory Utility Commissioners v. F.C.C.*, 553 F.2d 601 (1976) ("*NARUC II*"), the court rejected the Commission's argument that two-way, non-video communications services offered by cable companies were not common carrier services because those services "were carried by entities (cable operators) previously adjudged to be non-common carriers." *Id.* at 608 (footnote omitted).

Rulemaking, 13 F.C.C.R. 21531, 21555 (1998) (emphasis added). For the purposes of section 224 and for the purposes of those provisions of the Act that do not deal with distinctions among local exchange carriers, the Act treats all telecommunications carriers alike. One of the clear purposes of the 1996 amendments to section 224 and to other provisions of the Communications Act was to place telecommunications carriers on a regulatorily neutral field without regard to whether those carriers began life as telephone companies or cable companies.[23] The Commission has disregarded this guiding principle in a number of proceedings dealing with cable facilities. In the current case, the Commission's refusal to follow the plain mandate of Congress has resulted in an analysis and an Order that cannot be upheld.

CONCLUSION

The Commission failed in its Order to answer the question that is essential to the proper application of section 224 to pole attachments made by cable companies that provide Internet access to the public using their own transmission facilities. Specifically, the Commission refused to decide whether such pole attachments are used "solely to provide cable service," or whether they are used to provide "telecommunications services." The court of appeals correctly decided that the pole attachments at issue were not used "solely to provide cable service," on the grounds that

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[23] Indeed, as the court noted in *City of Dallas v. F.C.C.*, 165 F.3d 341 (5th Cir. 1999), "two of the primary goals of the Act were to facilitate cable companies' becoming LEC's and to permit LEC's to become cable companies." *Id.* at 354 n.13; *see also In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 F.C.C.R. 15499, 15989-90 (1996) ("We believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise.").

Internet access is not a "cable service" under the Act. The court went on to hold, however, that the Commission does not have jurisdiction to regulate pole attachments for cable facilities used to provide Internet access services because Internet access services are information services rather than telecommunications services. This second holding by the court of appeals is incorrect because it fails to recognize that every information service offered to the public for a fee is necessarily provided over a telecommunications service. Both the plain language of the Communications Act and twenty years of Commission precedent teach that telecommunications services used to deliver information services do not cease to be telecommunications services simply because of the use to which they are put.

Based on the foregoing, the holding of the Eleventh Circuit that the pole attachments here at issue are not used "solely to provide cable service" should be affirmed, and the Eleventh Circuit's holding that the Commission may not regulate such pole attachments under its section 224(e) authority over pole attachments used for telecommunications services should be reversed.

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